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*Supreme Court of Pennsylvania.*FARNHAM, KIRKHAM & CO. v. THE CAMDEN AND AMBOY
RAILROAD COMPANY.

A carrier may by special contract limit his liability except as against his own negligence.

Where a person delivers goods to a carrier and receives a bill of lading expressing that the goods are received for transportation subject to the conditions on the back of the bill, by one of which the carrier's liability is limited to a certain rate per lb., this constitutes a special contract by the parties, and the carrier, in the absence of proof of negligence, is only liable at the rate agreed upon.

Goods were received by defendants, a railroad company, under a special contract as set forth in the preceding paragraph, and were safely carried to their wharf at New York, and placed on the wharf ready for delivery, but before the plaintiffs had notice of their arrival or opportunity to remove them, a fire broke out on board a steamer of the defendants lying at the wharf, which entirely consumed the boat, and also the wharf and the goods thereon. There was no evidence as to the origin of the fire. *Held*, that plaintiffs could not recover more than the special rate agreed upon without proving negligence of the defendants.

THIS was a case stated to determine the liability of the defendants under the following circumstances. The plaintiffs delivered to defendants for transportation to New York certain bales of goods, of the weight of 3220 pounds and the value of \$6778.24. A bill of lading for the goods was signed by an agent of defendants and delivered to plaintiffs, who accepted and transmitted it to New York to their agent to receive the goods. The bill promised to deliver the goods "subject to the conditions expressed on the back of this receipt," the material parts of which were as follows: "The responsibility of the company as carriers of the within named goods is hereby limited so as not to exceed one hundred dollars for every 100 lbs. weight thereof, and at that rate for a greater or less quantity, the shipper declining to pay for any higher risk. The company will insure to any amount if desired."

The defendants were a corporation created by the state of New Jersey, and by the law of that state were authorized to limit their liability in the manner above stated, upon giving notice in the bill of lading and by a general notice posted in the company's office for receiving freight. Due notice was given in these ways in this case.

The goods were safely transported to New York, where they arrived on the night of Saturday July 9th or on the morning of

Sunday July 10th 1864, and were placed under a shed on the wharf ready for delivery, and while there and before the plaintiffs had notice of their arrival or opportunity to remove them, a fire broke out on board a steamboat called the John Potter, belonging to the defendants and then lying at the aforesaid wharf, which totally consumed the said steamboat, wharf and sheds and all the goods thereon, including the plaintiffs' bales. The origin of the fire was totally unknown; four watchmen employed by defendants being on duty at the time on the wharf and boat and the crew on the boat.

Defendants admitted their liability for \$3220, being at the rate of \$1 per lb., and had paid that amount without prejudice; but the plaintiffs claimed \$6778.24, the value of the goods.

The judgment at Nisi Prius was for defendants, and the plaintiffs then had the case certified to the court in banc.

Henry M. Phillips, for the plaintiffs.—The carrier's duty is to transport goods, and he is legally responsible for all losses from whatever cause arising, except the acts of God and the public enemy.

Regarding him as an insurer, the law allows him to demand a premium proportioned to the hazard of his employment: *Coggs v. Bernard*, 2 Ld. Raym. 909; *Same v. Colton*, 1 Id. 546, 655, 1 Salk. 143; *Riley v. Howe*, 5 Bing. 217; *Lockhart v. Lichten-thaler*, 10 Wright 151, 4 Am. Law Reg. N. S. 15.

Whilst there are a number of cases that concede that carriers may, by express agreements, avoid their common-law liability as insurers, yet such a contract will not excuse the carrier from gross carelessness or negligence; and the onus of showing that the cause of the loss was within the terms of the exception, and also that there was no negligence, lies on the carrier: *Angell on Carriers*, §§ 267, 268, 275; *Hollister v. Nolen*, 19 Wend. 234; *Cole v. Goodwin*, Id. 251; *Sager v. Railroad Co.*, 31 Maine 228; *Swindler v. Hilliard*, 2 Richardson 286; *Davidson v. Graham*, 2 Ohio 133; *Gould v. Hill*, 2 Hill 623; 2 Kent 607, note c; *C. and A. Railroad Co. v. Baldauf*, 4 Harris 67; *Penna. Railroad Co. v. McCloskey*, 11 Id. 526; *Ill. Central Railroad Co. v. Read*, 37 Ill. 37; *Hooper v. Wells*, 5 Am. Law Reg. N. S. 16.

The duty of a carrier is not fulfilled by simple transportation

from port to port. The goods must be landed and the consignee notified of their arrival: *Owners of the Mary Washington v. Ayres*, 5 Am. Law Reg. N. S. 692.

All that the bailor has to do, in the first instance, is to prove the contract and the delivery of the goods, and this throws the burden of proof that they were lost, and the manner they were lost, on the bailee, of which we have a right to require very plain proofs: *Beekman v. Shouse*, 5 Rawle 179; *Clarke v. Spence*, 10 Watts 337.

The case of *Swindler v. Hilliard*, 2 Richardson 286, is remarkably like the present. There the verdict showed that cotton in bales was burnt on board a boat running between Charleston and Columbia, and there, as here, was proven a special contract exempting the carrier from dangers of fire or navigation. How the fire originated was unexplained, and from the evidence there was in that case at least as much care and watchfulness as in the present one. But all the judges concurred in the opinion that the burden of proof as to cause of the fire, rested on the carrier, and in the absence of this, the inference was against him. This case is cited and approved in Angell on Carriers, § 267.

J. E. Gowen, A. I. Fish and St. George T. Campbell, for the defendants.—1. A carrier may limit his liability: *Southcote's Case*, 4 Coke 84 (that this is still authority, see *Farmers', &c., Bank v. Champlain Trans. Co.*, 23 Vt. 205); *Paradine v. Jane*, Aleyn 26; *Morse v. Slue*, Ventris, pt. 1, 190, 238; *Kenrig v. Eggleston*, Aleyn 93; *York Co. v. Central Railroad Co.*, 3 Wall. 107; *Peninsula, &c., Co. v. Shand*, 11 Jur. 771; *Dorr v. N. J. Steam Nav. Co.*, 1 Kernan 484; *Bingham v. Rogers*, 6 W. & S. 495; *Lang v. Calder*, 8 Barr 479; *Camden, &c., Railroad Co. v. Baldauf*, 4 Harris 67; *Chouteaux v. Leech*, 6 Id. 224; *Whitesell v. Crane*, 8 W. & S. 373; *Van Toll v. S. E. Railway Co.*, 12 Scott 75.

2. A special acceptance, as in this case, changes the rule of liability of the carrier. *Steamboat New World v. King*, 16 Howard 475; *Citizens' Ins. Co. v. Marsh*, 5 Wright 394; *Hays v. Kennedy*, Id. 378; *Thorogood v. Marsh*, Gow's Rep. 105; Story on Bailments, § 551, 7th ed.; *Peck v. N. S. Railway Co.*, 32 Law Journal Rep. 241.

3. A loss in a case like the present is not presumed to be the

fault of the carrier, so as to cast on him the burden of proof. It is true that in the case of a common carrier, who has made no special contract with his customer, the fact of the non-delivery of the goods intrusted to his charge is alone sufficient to render him responsible, but there the question of negligence is not in issue. He is held responsible because his undertaking was that of an insurer, and, negligent or not, he must make good the loss. He was paid for insuring the delivery of the goods, and cannot complain of being held to his obligation. But a private carrier, or any other ordinary bailee for hire, is liable only for negligence, and is not to be presumed guilty until he prove his innocence. Where he fails to deliver the articles committed to his custody, he must, of course, give some reasonable account of the circumstances on which he relies as an excuse. That obligation is necessarily implied even where the bailment was gratuitous, and the silence of the bailee under such circumstances would, from the very necessity of the case, be conclusive evidence of the grossest negligence or even fraud. But where the non-delivery is accounted for, and it does not appear that there was any negligence on the part of the bailee, the maxim *quod non apparet, non est*, will apply as in other cases: *Beekman v. Shouse*, 5 Rawle 189; *Clark v. Spence*, 10 Watts 335; *Goldney v. Penn. Railroad Co.*, 6 Casey 242; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 Howard 384; *Marsh v. Horne*, 5 B. & C. 243; Angell on Carriers, § 276; Story on Bailments, § 573; and Greenleaf on Evidence, § 218; *Sager v. The Railroad Company*, 31 Maine R. 228. See also the elaborate opinion of PARKE, B., in *Wild v. Pickford*, 8 M. & W. 460.

4. The defendants offered to receive the goods without limitation as to responsibility, if paid a compensatory rate. It is like the case of receiving goods of a certain value at one rate, and those of higher value at a higher rate. The plaintiffs having chosen the lower rate should not have the higher indemnity.

The opinion of the court was delivered by

THOMPSON, J.—It does not admit of a doubt, that a common carrier may, by a special contract and perhaps by notice, limit his liability for loss or injury to goods carried by him, as to every cause of injury excepting that arising from his own or the negligence of his servants. A great variety of cases cited in the very

able argument of the learned counsel for the defendants, establishes this as the rule in England, from *Southcote's Case*, 4 Coke's Rep. 84, A. D. 1601, down to *The Peninsular and Oriental Steam Navigation Company v. The Hon. Farquar Shand*, 11 Jurist 771, in 1865. The same rule generally holds in the several states in this country, as will appear in Story on Bailments, § 549, notes (a) and (b), *Dorr v. New Jersey Steam Navigation Company*, 1 Kern. 484, and in the Supreme Court of the United States, *York Co. v. The Central Railroad Co.*, 3 Wall. 107. This has long been the rule in this state, as is shown by *Bingham v. Rogers*, 6 W. & S. 495; *Lang v. Calder*, 8 Barr 479; *The Camden and Amboy Railroad Co. v. Baldauf*, 4 Harris 67; *Chouteaux v. Leech*, 6 Id. 224; *Goldey v. Pennsylvania Railroad Co.*, 6 Casey 248; and *Pennsylvania Railroad Co. v. Henderson*, Leg. Int., vol. 28, p. 248, 1866. That there was a special acceptance limiting the defendants' liability to \$1 a pound in case of loss or destruction in this case, is among the facts found in the case stated. The bill of lading duly executed and signed by the agent of the defendants containing the limitation, it is agreed, was delivered to the plaintiffs, accepted by them, and remitted to their agent at New York as his authority to receive the goods. These, therefore, were the terms on which the transporters shipped their goods, and on which they were received to be transported. As this was a limitation of the common-law liability, we are to presume, of course, that the charge for transportation was in proportion to the risk, an element of charge in all such cases. The condition of shipment on the bill of lading shows this by expressing the limitation to be, because of the "shipper declining to pay for any higher risk." We have, therefore, a contract to transport goods under a special agreement as to liability, and a consideration based, we must presume, on the undertaking in its limited form. This limitation, we are warranted in saying, took the case out of the law of common carriers and carried it into one of the numerous classes of bailments, and it henceforth became liable to be governed by the law of the class. The reason will be apparent on a moment's reflection. The common law defines the duty and the liability in the one case—in the other the law is set aside by agreement of the parties, and they make a law for themselves, and thus they stand on the relation they create and not on the law of common carriers.

By the common law the carrier is an insurer of the goods intrusted to him, excepting so far as they are damaged by the act of God or public enemies. By a contract limiting liability, he is an insurer by agreement and according to its terms. If there be a loss, the agreement furnishes the extent of liability, and the bailor is confined to that unless he can show that the loss occurred from the wilfulness or negligence of the carrier. His liability is as a private carrier or bailee, as a consequence of the limitation. This is settled in various forms of expression, in numerous books and cases of authority. In Angell on the Law of Carriers, § 268, it is said: "Therefore, as there has been occasion before to show, that in cases of contract, and by means of notices, common carriers descend to the situation of only private carriers for hire." In *York County v. The Central Railroad Co.*, *supra*, this language is found: "By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee, a private carrier for hire." In *Goldey v. The Pennsylvania Railroad Co.*, 6 Casey 242, we said the same thing in these words: "The most it (the limitation) can do, is to relieve them from those conclusive presumptions of negligence which arise, when an accident happens that is not inevitable even by the highest care, and to require *that negligence be actually proved against them.*" In *The N. J. Steam Nav. Co. v. The Merchants' Bank*, 6 How. 384, the principle is thus stated: "The respondents having succeeded in restricting their liability as carriers by the special agreement, the burden of proving that the loss was occasioned by the want of due care, or by gross negligence, lies on the libellants, which would be otherwise in the absence of any such restriction." The same principle appears in *Marsh v. Horne*, 5 B. & C. 243, where the limitation as to the extent in value of liability, was held to vary the relation and require proof of negligence against the carriers. So in *Harris v. Packwood*, 3 Taunt. 264, this rule was applied. See also to this effect, Angell on Carriers, § 276; Story on Bail., § 573; 2 Greenl. Ev., § 218; and *Sager v. The Railroad Co.*, 31 Maine R. 228. Without pursuing further this line of thought, we must proceed to determine how this case stands affected by these principles.

The plaintiffs shipped goods on the 8th of July 1864, by the defendants' line, to New York, under an acceptance of limited liability as well as notice.

The goods were safely carried by the defendants to their wharf at New York, and placed under a shed on the wharf ready for delivery, but before the plaintiffs had notice of their arrival or opportunity to remove them, a fire broke out on board a steamer of the defendants lying at the wharf, which entirely consumed the boat with her cargo, and also the wharf and shed and the goods therein, including the goods of the plaintiffs. The origin of the fire remains unknown. Watchmen employed by the defendants were on duty at the time, and the crew of the steamer were on board. These facts all appear in the case stated. It also appears that the defendants have paid to the plaintiffs the full amount of liability stipulated for and assumed in case of loss in the bill of lading. Are they bound to the extent of the entire loss? If so, the exception or limitation would amount to nothing; not, it is true, because the limitation is void, but on a question regarding the burden of proof. Assuming the contract, or special acceptance of the goods to be carried by the defendants, to bring them within the doctrine applicable to bailments for compensation, the rule seems clearly to be, "that where a demand of the thing loaned is made, the party must return it, or give some account how it was lost. If he shows a loss, the circumstances of which do not lead to any presumption of negligence on his part, then the burden of proof might perhaps belong to the plaintiff to establish it:" Story on Bail. § 278. "But if a suit should be brought against the pawnees for a negligent loss of the pawn, then it would be incumbent upon the plaintiff to support the allegations of his declarations by proper proofs, and *onus probandi* in respect to negligence would be thrown on him:" Id. § 339, and note 4. "With certain exceptions, which will hereafter be taken notice of (as to innkeepers and common carriers), it would seem that the burden of proof of negligence is on the bailor; and proof merely of the loss is not sufficient to put the bailee on his defence:" Id. § 410. The text is supported by many authorities. The common law, consistent with itself in this, as in all other cases, lays the basis of this rule in the presumption that every person is presumed to do his duty until the contrary is proved. This is a great modification of the Roman law, which held the acts of faithlessness in a bailee as infamous, and compelled him to acquit himself thereof by proof. The French rule as to proof is the same. The rule in England

and in many of the states, if not all, is what Story states it to be *supra*. See *Marsh v. Horne*, 5 B. & C.; and *Harris v. Packwood*, 3 Taunt. *supra*; and *Wild v. Pickford*, 8 M. & W. 460. In *Beekman v. Shouse*, 5 Rawle 179, speaking of a case of special acceptance to carry, and of suit against the bailee, ROGERS, J., says: "Less than positive proof" (why the goods never reached their destination) "would suffice; but some account should be given from which the jury would be warranted to infer that the goods had either been discharged or had been lost by accident, or had gone into other hands than the defendant's or his agents." This case shows that where a bailee accounts for a loss, in a way not to implicate himself in a charge of negligence, this is a sufficient defence, unless the plaintiff prove negligence. This is the plaintiff's reply to the plea in excuse of performance. It is an affirmative position, and must be proved by the party alleging it.

It is true, the plaintiffs in the first instance, taking the present case in illustration, must have shown, if it had been tried in the ordinary way, that they delivered the goods to the defendants to be carried to New York, that their agent called for them and could not get them; there they might rest to hear the reply, and that would be proof that the goods were accidentally consumed by a fire breaking out on the steamboat at the wharf, which consumed the boat, the wharf and buildings of the defendants, and the goods in them, including the plaintiffs'; that the boat had its complement of men on board, and the defendants' four watchmen on the wharf, but from these facts negligence could not be inferred. The plaintiffs' reply would be, "All that may be true; but the fire originated in your negligence." Is it not perfectly clear that, as that was not inferable from the defendants' own case, that the plaintiffs must prove it? This is not to be doubted. The same doctrine with that cited above is also to be found in *Clark v. Spence*, 10 Watts 335, in *Goldey v. Penna. Railroad Co.*, 6 Casey, *supra*, and in *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 384. We think, therefore, that as the contract to carry these goods was as bailees for hire, and not as common carriers, and as they did carry them according to their agreement to the terminus of their line, and they were there destroyed by fire, the defendants are not liable, in the absence of proof of negligence, to respond to the plaintiffs' claim. The doctrine is firmly settled,

that a common carrier cannot limit his liability so as to cover his own or his servants' negligence. Nor do I suppose this possible of any bailee. But it is clear that by contract he may be placed in the position of a limited insurer, excepting negligence, instead of an insurer against everything but the act of God or public enemies. If he be compensated only for the former risk instead of the latter, at the choice of the consignor, it would be contrary to common honesty to compel him to make good a risk he is not paid for assuming. We think this case was well decided at *Nisi Prius*, and the

Judgment is affirmed.

WOODWARD, C. J., dissented as to the *onus probandi*.

THE CONSTITUTIONALITY OF THE EXEMPTION CLAUSE OF THE BANKRUPT ACT.

[An article having appeared in a previous number of this Journal (October 1867), on the constitutionality of the concluding exemption clause in the Bankrupt Act, we give, by request of the framer of the bill, the remarks of Senator POLAND in the course of the earnest and very able debate on this portion of the act in the Senate. See Congressional Globe, February 2d 1867, page 962, &c.—Eds. AM. LAW REG.]

Mr. POLAND.—Mr. President: I confess that were it not for the very confident manner in which members of the Senate, whose opinions are entitled to very great respect, especially upon legal subjects, have declared their opinion that this adoption of the Homestead Exemption Laws of the different states renders this law open to the objection that it is not uniform, I should have felt that the objection was entirely frivolous.

I think, if it were in our power, if it were possible for us to adopt the systems of the different states in relation to the exemptions in favor of poor debtors, every member of the Senate would say that as a matter of discretion, as a matter of judgment, as a matter of prudence, as a matter of safe and proper legislation, it was better to leave that subject to be regulated by the state legislatures, who know the circumstances, the wants, the condition of all their inhabitants, rich and poor, better than we can. All would agree that it had better be left to them to say what mercy